In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 108

WALTER ELLSWORTH BREHM, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 161-165)[1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1952 (R. 166). By order dated

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[1] The designation "R." refers to the Joint Appendix in the Court of Appeals to which is appended the record proceedings in that Court. The designation "Tr." refers to the typewritten transcript of the record at the trial.

May 16, 1952, Mr. Chief Justice Vinson extended the time for filing a petition for a writ of certiorari to and including June 9, 1952 (R. 169). The petition was filed on June 6, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court properly denied petitioner's motion for judgment of acquittal.

2. Whether the trial court erred in admitting in evidence, as bearing on the question of petitioner's purpose, testimony of payments by one of his clerks in addition to those alleged in the counts of the indictment involving said clerk as to which petitioner was acquitted.

3. Whether the Commission that selected the grand jury which returned the indictment against petitioner was lawfully constituted.

STATUTES INVOLVED

18 U.S.C. 208 (1940 ed.) provided:

> § 208. (Criminal Code, section 118, as amended.) Political contributions; solicitation. It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the

United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

18 U.S.C. 209 (1940 ed.) provided:

§ 209. (Criminal Code, section 119) Same; not to be received in public offices. No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in section 208 of this title, or in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.

11 D.C. Code (Supp. VII) 1401 provides in pertinent part:

There shall be, and there is hereby, constituted a jury commission for the District of Columbia, which shall be composed of three commissioners, * * *. Such commissioners shall be appointed by the District Court of the United States for the District of Columbia, in general term, and shall serve for a term of

three years and until their successors are appointed and qualified; except that the members first appointed shall serve for one, two, and three years, respectively, as may be designated by said court. Before entering upon the discharge of their duties they shall each take an oath of office to be prescribed by the District Court of the United States for the District of Columbia * * *. It shall be the duty of said jury commission to make and preserve a record of the list of names of jurors, both grand and petit * * * to place the names in the jury box, and to have custody and control of said jury box, and to draw the names of said jurors * * * from time to time, as hereinafter provided. * * * In the event of the illness or other inability or absence from the District of Columbia of any one of said commissioners, the two other commissioners may perform the duties of said jury commission.

STATEMENT

On December 20, 1950, a 7-count indictment was returned against petitioner in the United States District Court for the District of Columbia, charging violations of 18 U.S.C. 208 (1940 ed.), and as to count 2, a violation of 18 U.S.C. 209 (1940 ed.). Each of the counts alleged that petitioner, while a Representative in Congress, unlawfully received a specified contribution "for the

political purpose of assisting in the financing of the defendant's campaign for re-election as such Representative in Congress" (R. 2-8). Counts 1 and 2 charged that petitioner received contributions from Clara Soliday, a clerk employed in his office. Counts 3 to 8 charged that petitioner received contributions on designated dates in the year 1948 from Emma S. Craven, while she was employed as a clerk in his office (R. 2-8).

At the close of the Government's case, the trial court granted petitioner's motion for judgment of acquittal as to count 1 when the evidence showed that transaction was barred by the statute of limitations (R. 118). The jury returned a verdict of not guilty as to count 2 (R. 159). Petitioner was convicted upon counts 3 to 7 and was sentenced to pay a fine of $5,000, and to serve a term of 5 to 15 months' imprisonment. Execution of the imprisonment portion of the sentence was suspended and petitioner was placed on probation. (R. 24-25.) On appeal, the judgment of conviction was affirmed (R. 166).

At the trial, the Government's evidence established that during the periods alleged in the indictment, petitioner was a Representative in Congress and that Clara Soliday and Emma S. Craven were employed as clerks in his office during the times specified, receiving as compensation for their services, checks drawn on the Treasurer of the United States (Tr. 75-77).

Mrs. Soliday testified as follows:

On January 10, 1945, when she commenced her employment with petitioner, she and petitioner discussed her duties in the office and the arrangement whereby she would draw her full salary check, and cash it, giving petitioner a certain amount each time, and keeping for herself an amount slightly in excess of her previous earnings in the Treasury Department (R. 61-63). This arrangement continued throughout the years until January, 1948, at which time she was discharged (R. 63-64). Payments were delivered to petitioner personally each month with the exception of the times when petitioner returned to Ohio, and then the money was mailed to him (R. 64-65). Petitioner had advised Mrs. Soliday to "Just leave Mrs. Brehm out of it" (R. 67).

F.B.I. Agent Nalls testified that when he first interviewed petitioner in August, 1950, the latter flatly denied ever having received any "kick-backs" from any of his employees, but admitted that, later, he learned from his wife that Mrs. Soliday had been making financial contributions for the 1946 campaign through Mrs. Brehm, and that the amount involved was around $1,200 (R. 85-88). The next day, petitioner informed agent Nalls that only $100 had been contributed by Mrs. Soliday, and that this amount was listed in his filed election expenses for 1946 as an anonymous contribution (R. 87).

Petitioner testified in his own behalf (R. 124-139), and in addition, portions of his testimony

before the Grand Jury were introduced into evidence by the Government (R. 89-99). Petitioner stated that, following the 1946 campaign, he called Mrs. Soliday into his office, thanked her for the contributions, and indicated that it would not be necessary to continue to do so, but that Mrs. Soliday was more or less insistent. Toward the 1948 campaign her contributions amounted to $500 (R. 88-89). Petitioner testified that he distributed this $500, which he later learned came from Mrs. Soliday, to five counties in his congressional district at campaign time; that he reported the receipt to the Clerk of the House as being derived from anonymous sources, and that the distribution was in the name of "Brehm for Congress Committee" (R. 126). On cross-examination, petitioner admitted that the "Brehm for Congress Committee" was himself (R. 136).

Mrs. Emma S. Craven testified as follows:

She began work in petitioner's office in February, 1948 (R. 73), accepting petitioner's offer of $2,400 base pay and also his plan of placing her on the payroll at $4,500, instead of $2,400, so that she could "donate to the political campaign fund" (R. 74-75). At that time, petitioner assured her that "not one cent of it would go back to him," but that the money would go to the "Republican committee;" that it was all right for her to make such donations; that he, petitioner, would be responsible for the donations and would send them on to the

committee (R. 75). Accordingly, each month Mrs. Craven cashed her payroll check based on $4,500, and returned the amount by which it exceeded the $2,400, approximately $210 per month (R. 76-77). This was done by placing the cash in an envelope which Mrs. Craven handed to petitioner personally each payday, because she believed that petitioner addressed it to the committeeman in Ohio (R. 76). In August, 1948, before petitioner left for Ohio, Mrs. Craven asked him if he was going to give her the name of the man on the Republican committee to whom she should send the money. Petitioner responded, "Just forward it to me, and I will see that he gets it" (R. 78). She mailed cash, instead of a check or money order, because petitioner "preferred it that way" (R. 78). Although Mrs. Craven was secretary of the Brehm for Congress Committee during 1948, she stated that she had nothing to do with the expenditures of the money listed in the report filed by that Committee, and at no time did she have in her possession, nor did she receive or disburse any of that money (R. 81-82).

Petitioner's testimony before the Grand Jury (R. 95-97) and at his trial (R. 124-139), was to the effect that shortly after Mrs. Craven was hired, she approached him in his office and offered a sealed envelope, stating (R. 95):

> I know you got a tough district. I know you haven't got any patronage. I know the

> Republican Party had been out of power. I like my job. I am so grateful to you for getting me back on the Hill I'd like to do something, help out the party * * *.

Petitioner asserted that he refused to accept the money, but that he finally permitted Mrs. Craven to place it in a drawer of a file cabinet in his office, telling her (R. 95):

> If you want to keep it in here you can keep it in here and later on if the committee wants it you can give it to me and if we need it or use it * * *.

Although the file cabinet was under petitioner's control, petitioner maintained that he never removed any of the envelopes, and that in January, 1949, he gave them all back to her (R. 96). Mrs. Craven denied the conversation as detailed by petitioner and also that any of the money was ever returned to her (Tr. 380-382).

ARGUMENT

1. Petitioner contends (Pet. 17-21) that the trial court erred in denying his motions for judgment of acquittal (R. 118, 150), arguing that the Government failed to prove that any of the contributions alleged to have been received by him were contributed for the political purpose specified in the indictment of assisting in financing his cam-

paign for re-election.[2] He places great stress on the fact that from Mrs. Craven's testimony, it may reasonably be inferred that "it was her avowed purpose to contribute to the Republican Committee for the campaign fund and not to petitioner's personal campaign" (Pet. 19). However, as the court below pointed out, it is not the intent of the donor, but the intent of the receiver which controls. It is clear that the offenses defined in 18 U.S.C. 208 (1940 ed.) can be committed only by the solicitor or receiver of a political contribution. Another statute, 18 U.S.C. 211 (1940 ed.), provided, in pertinent part, that

> No * * * clerk * * * in the service of the United States shall, directly or indirectly, give * * * to any * * * Member of * * * Congress * * * any money * * * on account of or to be applied to the promotion of any political object whatever.

The act of the donor and the act of the receiver are each separate and distinct offenses. As the Court of Appeals aptly stated with respect to a parallel statute, 18 U.S.C. 203 (now 18 U.S.C. 281), in *May* v. *United States*, 175 F. 2d 994, 1003 (C.A. D.C.), certiorari denied, 338 U.S. 830:

> In the case at bar, the statutory offense was the receipt of compensation by the Congress-

[2] While the statute prohibits receipt of money from federal employees "for any political purpose whatsoever," the indictment did specify the political purpose of assisting in financing petitioner's campaign for re-election.

> man. He alone could commit that statutory offense. It is true that his act of receiving the compensation could not be performed by him alone; some other person must necessarily give it to him. And so the situation is that although the offensive act necessarily involved the co-operation of two people, the part played by one of them alone is made a criminal offense.

Accordingly, irrespective of Mrs. Craven's intention, whether to contribute to the Republican Party campaign fund, or to petitioner's campaign for re-election, the issue presented was whether petitioner, as a Representative in Congress, received the money for the political purpose of assisting in the financing of his campaign for re-election. If that was his purpose in receiving the money, it is immaterial that, to get it, he perpetrated a fraud on the donor.

As the court below held, petitioner's own testimony was sufficient to justify an inference that he took the money for the purpose of financing his own campaign. The issue of his intent was therefore properly submitted to the jury under a charge that the prosecution must fail unless the jury found that the contribution was received for the specific purpose charged in the indictment (R. 158). Thus, the jury on ample evidence found all that the indictment charged, and all that the

statute requires, *i.e.*, that petitioner received money from a Government employee, his clerk, for the political purpose of financing his own campaign.

2. Petitioner's contention that the trial court erred in allowing Mrs. Soliday to testify to payments made prior to the transactions charged in counts 1 and 2 of the indictment (Pet. 14-17) is clearly without merit. The evidence was received as bearing on the issue of petitioner's plan and purpose, and the jury was instructed that it could be considered only (R. 158) "as it may tend to reflect upon a plan to commit the offense charged in count 2 of the indictment in this case, and also as it may tend to show the purpose the defendant had in mind when he received, if he did receive, the $140 referred to in count 2 of the indictment here." Since the jury acquitted petitioner on count 2, the question is no longer in the case. In any event, it is clear that the judge's ruling was correct. Petitioner contends that the evidence had no tendency to show purpose since Mrs. Soliday testified that she did not know what the payments were for. However, as discussed above, it was petitioner's intent, and not Mrs. Soliday's, that was in issue. It was certainly relevant on the issue of his intent that he had a long-established scheme to take "kick-backs" from his employees which he used to finance his political campaign. The evidence was thus properly admitted under the well-established

rule that evidence of prior offenses is admissible to show intent. See *Kowalchuk* v. *United States,* 176 F. 2d 873 (C.A. 6); *McCoy* v. *United States,* 169 F. 2d 776 (C.A. 9), certiorari denied, 335 U.S. 898; *Henderson* v. *United States,* 143 F. 2d 681 (C.A. 9).

3. Finally, petitioner urges that the Commission that selected the Grand Jury which returned the indictment against him, was unlawfully constituted (Pet. 21-24). Prior to the trial, petitioner filed a motion to dismiss the indictment against him on the grounds that (1) the names of the Grand Jurors who returned the indictment against him were drawn and selected by two Jury Commissioners, rather than three, as required by law; and (2) that the two Jury Commissioners who purported to act were not legally appointed and qualified because (a) they had not taken the oath of office as prescribed by statute, and (b) the terms of office for which each Commissioner was appointed were not in accordance with the law (R. 9-10).

In response to petitioner's motion, the Government filed an affidavit (R. 12-13) of one of the participating commissioners, stating that the absence of the third commissioner, at the time of the Grand Jury's empaneling, was due to "his serious illness," a legal excuse under 11 D.C. Code (Supp. VII) 1401.

The trial court denied petitioner's motion, holding (R. 11):

> * * * The two jury commissioners, upon their original appointment, did take oaths of office. They were legally qualified to act until their successors were appointed and qualified; no other persons have been appointed to succeed them. They were, therefore, legally appointed and qualified at the time they acted in drawing and selecting the grand jury here in question. I do not consider that the matters alleged in any way affect the validity of the grand jury or the indictment here involved.

On appeal, the Court of Appeals examined petitioner's contentions and concluded that the same arguments had been fully considered and rejected by it in *Collazo* v. *United States*, 196 F. 2d 573, certiorari denied, 343 U.S. 968, No. 471 Misc., October Term 1951.

As we pointed out in our brief in opposition in that case, 11 D.C. Code (Supp. VII) 1401 provides for the appointment of jury commissioners by the District Court "for a term of three years and until their successors are appointed and qualified; except that the members first appointed shall serve for one, two, and three years, respectively, as may be designated by said court." Since 1931 the practice in the District Court for the Dis

trict of Columbia has been to fill vacancies arising during an unexpired term by appointment to a full term of three years rather than for the balance of the unexpired term. The two jury commissioners in this case were appointed in the same year.

The court below concluded in the *Collazo* case that such a "construction of the statute was permissible". Save for the original three appointments for unequal terms, the act seems to authorize a three-year tenure for all new appointees, regardless of when the vacancy is created. This construction is supported by the fact that, in its subsequent provisions, the statute, in vesting the court with "power summarily to remove any of said commissioners for absence, inability, or failure to perform his duties as such commissioner, or for any misfeasance or malfeasance," specifically limits the court's authority to fill the vacancy only "for the unexpired term." If a similar limitation had been intended for all other appointments, it would, no doubt, have been clearly expressed in the statute.

The two participating commissioners were not acting illegally because they had not renewed their oaths of office upon their reappointment in 1948 where each had taken the oath on his original appointment in 1945. Although the court below, in the *Collazo* case, expressed the view that, "probably a better procedure would be to renew

the oath upon each reappointment," it observed that "there was no specific statutory reference to an oath upon reappointment." The statute provides that "Before entering upon the discharge of their duties they shall each take an oath of office." The clause could not possibly, at the time of its enactment, have had reference to reappointments, because reappointments were expressly forbidden under the original act.

Moreover, since, under the language of the statute, each of the two commissioners' original appointments ran "for a term of three years and until their successors are appointed and qualified," the expiration of their terms of office did not automatically relieve them of their responsibilities, and, consequently, they were validly acting as "holdovers" under their first appointment, when they selected the Grand Jury in question. *Badger* v. *United States ex rel. Bolles,* 93 U.S. 599, 602.

The issue with respect to the Jury Commissioners is one of local law on which the decision of the Court of Appeals will be accorded finality in the absence of egregious error. *Griffin* v. *United States,* 336 U.S. 704, 713-718; *Fisher* v. *United States,* 328 U.S. 463, 476-477. No such error is here shown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JAMES T. KELLS,
Attorneys.

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